on a treasurer for his neglect of duty in this respect, but usually these are recoverable only at the suit of the Commonwealth. When a motion is made to quash an application to purchase, the owner might be allowed the right to make the treasurer a party where the defence is the neglect of the treasurer to discharge his duty in the collection of the revenue, and if it be *plainly* shown that he has been guilty of gross negligence, he might be made to pay the *costs and penalty*, but in no case the taxes and interest. This remedy, however, is liable to great abuse and might subject treasurers to great annoyance and expense. It is probable that the privilege of making him a party and of subjecting him to the payment of the costs and penalty should be restricted to the case where the taxes have been paid and yet the land returned delinquent.

5. When more than one application is made to purchase the same tract, a speedy and cheap method should be given the applicants to test the validity of each other's applications without expense to the owner, or the owner should be allowed to test all applications in one proceeding, to which all applicants should be made parties. The owner should not be harrassed by two proceedings for the same cause of action, nor should he be put to the hazard of determining between two or more applicants which has the first valid application. This is no imaginary trouble. We know of a number of cases in which two applications have been filed for the same land. The second applicant deemed the first application fatally defective and hence filed application to purchase the land.

Other suggestions have occurred to us, but they are, in the main, of minor importance. It seems to us that the Act should be amended and perfected, rather than repealed, for every one recognizes the fact that taxes are not "equal and uniform" unless there is uniformity in the collection as well as in the imposition.

M. P. BURKS.

MOORE V. TRIPLETT.*

Supreme Court of Appeals: At Richmond.

January 12, 1899.

1. SALE OF LAND IN CONSIDERATION OF PAYMENT OF DEBTS OF GRANTOR—*Liability of purchaser—Liability of the land.* Where a debtor sells and conveys his land to a purchaser who assumes the payment of certain debts of the vendor in consideration of the conveyance, the purchaser becomes personally responsible for the payment of the debts, and, as between him and his vendor, is primarily liable. In such case the grantee not only becomes personally and primarily bound for the debts, but, if they are not paid, the land itself may be subjected to their payment in the hands of the grantee, or his representatives, or his voluntary alienee. Courts of equity look upon the transaction as in the nature of a trust.

2. CHANCERY PRACTICE—*Judicial sales—Confirmation—Discretion.* Whether a judicial sale should be confirmed or not depends upon the circumstances of the particular case. The court should exercise a sound legal discretion with

*Reported by M. P. Burks, State Reporter.

a view to fairness, prudence and a just regard to the rights of all concerned. The action of the court should be such as to induce bidders to attend, and to encourage fair, open and competitive bidding in order to obtain the highest possible price and inspire confidence in the stability of judicial sales.

3. CHANCERY PRACTICE—*Judicial sales—Upset bids—Who may not put in.* A court of equity must exercise a sound legal discretion as to whether or not it will accept an upset bid on land sold under its order. A mere advance of ten per cent., though well secured, is not always to be accepted without regard to the circumstances of the case. But a substantial and well-secured upset bid should be accepted, unless there are circumstances going to show that injustice will be done to the purchaser, or other person. Usually, however, one who was present at the sale and bid on the property, or had the opportunity of bidding, will not be permitted to put in an upset bid.

4. CHANCERY PRACTICE—*Judicial sales—Sales in parcels—Setting aside only part of sales—Rights of purchaser.* Where land has been sold in parcels, and one person has become the purchaser of two or more parcels to be used together, and the purchase of one parcel was the inducement to become the purchaser of the other, if, by reason of an upset bid, the purchaser loses one parcel a court of equity ought not to compel him to take the other against his consent, especially if the terms of the upset bid preclude a resale of the tract in the same manner as before.

Appeal from several decrees of the Circuit Court of Shenandoah county, pronounced in three chancery suits heard together, in two of which the appellees, or some of them, were the complainants, and the appellants were the defendants, and in the other the appellants were the complainants, and some of the appellees were the defendants.

Affirmed.

M. M. Moore borrowed of Israel Allen five thousand dollars May 9, 1882, and a like sum July 20, 1882, which sums he secured by deeds of trust on a portion of his real estate. On July 11, 1885, he was largely indebted to his mother on various accounts, and she was his surety for a large sum. In consideration of these sums and in the further consideration that his mother assumed the payment of the two debts to Allen, aggregating $10,000, and of certain other enumerated debts, he conveyed to her by deed bearing date July 11, 1885, all of his real and personal estate, including that covered by the Allen deeds of trust. His wife did not unite in this deed. By deed bearing date the same day, July 11, 1885, his mother conveyed the same property to a trustee to furnish a support to her son, and the residue for the benefit of his wife and children, subject, however to the payment of the debts for which she was liable for her son. Both deeds were admitted to record on the same day. A few days there-

after these two deeds were assailed as fraudulent by Triplett and others, creditors of M. M. Moore whose debts were not secured. Pending this litigation Allen, who was a party to the suit, directed his trustee to make sale of the land conveyed in trust to secure his debts. This sale was enjoined. Finally the two causes were heard together and the deeds aforesaid were declared fraudulent and void, and the property conveyed held liable for complainants' debts. Liberty was asked to file a bill of review for errors apparant on the face of the record, but was refused. On appeal to this court the decree holding the deeds fraudulent was reversed and the cause remanded for further proceedings. The property conveyed by M. M. Moore to his mother, Mrs. A. M. F. Moore, embraced not only the land conveyed in trust to secure the debts of Israel Allen, but other real and personal property upon which his creditors had no lien. A large part of the consideration of the deed to her, however, was certain enumerated debts of M. M. Moore, the payment of which she had assumed. It was contended on behalf of Mrs. A. M. F. Moore and those claiming under her that the assumption of the debts of M. M. Moore by Mrs. A. M. F. Moore was a mere personal undertaking on her part and created no lien on the land conveyed by her, and no trust in favor of the creditors. The deed of settlement made by Mrs. A. M. F. Moore was in the following words and figures:

"Whereas, Amanda M. F. Moore, of the county of Shenandoah, State of Virginia, has become the purchaser of certain real and personal estate in said county and State from Morgan M. Moore, as is evidenced by deed bearing date of July 11, 1885, to which special reference is hereby made, and she being desirious, as far as legal and proper for her to do, to dispose of the same for the benefit of her son, Morgan M. Moore, his wife and children, of whom there are now two, and such other or others as may be begotten or born in the lawful wedlock of M. M. Moore and Kate G. Moore his wife, the property hereinafter conveyed; but on the following conditions, and these alone:

"1. The said M. M. Moore is to have from the said estate a fair and reasonable support, to be suitably and regularly furnished. The grant as to this is to be personal, and not liable in any wise for his, M. M. Moore's debts in *præsenti* or *in futuro*, and to be a charge on said estate for that purpose, and none other, and the proceeds arising therefrom, *i. e.*, from said estate, to be applied not otherwise, except as hereinafter provided.

"2. For the sole and separate use of Kate G. Moore and her children, begotten as aforesaid, free from the use, control, debts and charges of or against her husband, the said Morgan M. Moore.

"And whereas, there are debts due by M. M. Moore, and which the said Amanda M. F. Moore, in one way or the other, is security or endorser, amounting to a sum large in amount but not now definitely ascertained nor secured; and

the said Kate G. Moore, wife of the said M. M. Moore, is willing that the said debts be paid in two, three and four years, either by sale of part of said real estate on judicious terms by the trustee hereinafter named, the said K. G. Moore and her husband uniting in the deed, the debts be paid proportionately and yearly from the date thereof, and on the consideration of the acceptance of these terms by said debtors, she, the said Kate G. Moore, agrees to unite in the conveyance, making a full relinquishment of her contingent right of dower as to them, but on no other condition whatever.

"And whereas, it is the true intent and meaning of this instrument that said M. M. Moore shall have the support aforesaid, the said Kate G. Moore and children be supported; and the children be educated out of the proceeds of said farm and estate, she, the said Kate G. Moore, shall have power to make leases, rent or farm said real estate judiciously, and sell stock off and from said farm and forage, as though she were the *feme sole* or separate trader; in fact, to manage said estate by suitable agents and hands, so as to carry out the purposes and intentions of this indenture, but not otherwise, and the authority above recited is not meant to authorize the said Kate G. Moore to charge this estate for debts not made in the legitimate operations of the estate aforesaid, in or by endorsements or security for others, nor beyond the yearly rents and profits, and the rents and profits shall be held for the joint use of Kate G. Moore and her children as aforesaid. But power is hereby given the said Kate G. Moore by and with the consent of the trustee hereinafter mentioned, to mortgage said real estate for the payment of the legitimate debts of the aforesaid A. M. F. Moore which she may be responsible for as security for Morgan M. Moore, as for the liens that are now existing on the real estate hereby conveyed. In view of the above recitals, and to effectuate the purposes of the same, and in strict conformity thereto, and for the consideration of natural love and affection, and of the sum of one dollar in hand paid at and before the sealing and delivering of these presents, the receipt whereof is hereby acknowledged—

"I, Amanda M. F. Moore, do hereby grant, release and confirm unto Robert J. Walker, trustee, to have and to hold, under the provisions of this trust, with all of recitals aforesaid, the following real and personal estate conveyed to me by Morgan M. Moore by deed, bearing date July 11th, 1885, to which reference is hereby made; and said deed is hereby made part and parcel of this one, so far as it recites the property, real and personal, conveyed. The said Kate G. Moore does not decline the provisions of this trust, and signs the same to signify her acceptance, except that she does not mean to so sign unless the provisions as it applies to the debts be accepted. In the event the creditors accepting the provisions of this trust as to the debts to which Kate G. Moore has conditionally agreed to pay, and she fails in any wise to comply with the provisions of this trust as to said debts, said creditors may require the trustee, Robert J. Walker, to sell on such terms and time, and after notice in writing, such property, real and personal, as he may think most judicious, and after due advertisement. And the said M. M. Moore, with his wife, as far as may be necessary, unites in this trust with its recitals, to signify his consent thereto, and to concur in its provisions.

"Witness the following signatures and seals this, the 11th day of July, 1885.

"A. M. F. MOORE. [Seal.]
"M. M. MOORE, [Seal.]
"KATE G. MOORE, [Seal.]
"ROBT. J. WALKER. [Seal.]"

When the sales of the property were reported to the court, sundry exceptions thereto were filed by the Moores and others, and amongst them, because substantial upset bids were filed on several of the tracts. How these bids got into the record of the cause does not clearly appear. The bids were in the following form:

"Know all men by these presents:

"That I, C. O. Miller, do hereby offer an advance bid of seven hundred and fifty dollars on the two tracts of land, one of sixty-nine acres and the other of about one hundred and eighteen acres, recently sold by L. Triplett, Jr., special commissioner and trustee, and E. D. Newman and W. T. Williams, special commissioners, acting under decree of the Circuit Court of Shenandoah county, in the chancery cause of *J. I. Triplett, &c.* v. *M. M. Moore, &c.*, the first tract having been knocked down to J. I. Triplett, at the price of sixty-three dollars per acre, and the second tract to John E. Roller, at the price of forty-nine dollars per acre, and I agree that the court may apply said advance or apportion the same to the said two tracts, as may seem to it the most equitable; but this offer of an advanced bid is made upon condition that it is applied to both tracts, and that both shall be offered again as one tract; and I bind myself to make said bid upon said land as a whole in the event the court decrees a resale, and to comply with the terms of sale in the event the land is knocked down to me at said advanced bid, and I waive my homestead exemption as to this contract and obligation.

"Witness my hand and seal this 1st day of September, 1896.

"C. O. MILLER, [Seal.]

"I, W. P. Crickenberger, by C. W. Bennick, my attorney in fact, acknowledged myself as surety for C. O. Miller, upon the foregoing contract and obligation; and I waive my homestead exemption as to this contract and obligation.

"Witness my hand and seal this 1st day of September, 1896.

"W. P. CRICKENBERGER, [Seal].

"By C. W. Benick, Attorney in fact.

"To the Hon. T. W. Harrison:

"I do hereby offer to become the purchaser at an up-set sale of the tract on the west side of the R. R., south end, containing 54 acres, ¼ timber as per plat of the M. M. Moore land, at the sum twenty-five dollars ($25) per acre, on the terms of sale, and will comply. Sold in suits of *Triplett* v. *Moore*, and other suits.

"This land was at the sale of Commissioners Triplett, Newman and Williams, August 7th sold—knocked down to J. I. Triplett.

"Witness my hand and seal September 4th, 1896.

"J. B. SPITZER, [Seal].

"I, Peter Estep, do hereby bind myself as security for the said J. B. Spitzer, in the above offer and bid, and bind myself to make it good

"Witness my hand and seal September 4th, 1896.

"PETER ESTEP, [Seal]."

The other facts sufficiently appear in the opinion of the court.

James H. Williams and *John E. Roller*, for the appellants.

Barton & Boyd, *L. Triplett, Jr.*, and *Walton & Walton*, for the appellees.

RIELY, J., delivered the opinion of the court.

This is the sequel of the case of *Moore* v. *Triplett*, reported in 23 S. E. R. 69.

The main question involved by the appeal is the propriety of the decree of the Circuit Court subjecting to the payment of the debts of Israel Allen and others the land conveyed by Morgan M. Moore to his mother by the deed of July 11, 1885, and settled by her by a co-temporaneous deed on his wife and children.

The debts were due by him, and assumed by his mother. They constituted a large part of the consideration for the conveyance to her of his land, and were successfully relied upon at the hearing of the former appeal to sustain the validity of the said deeds. She died without having paid the debts, and they have not since been otherwise discharged. They have remained unpaid from 1885 down to the present time, upwards of thirteen years. The debts of Allen were secured by prior deeds of trust on parts of the land conveyed by Morgan Moore to his mother.

By accepting the conveyance and promising to pay the debts, she became personally liable for them, and between her son and herself she was primarily bound. This doctrine has been so repeatedly recognized by this court as no longer to admit of question. *Willard* v. *Worsham*, 76 Va. 392; *Osborne* v. *Cabell*, 77 Va. 462; *Francisco* v. *Shelton*, 85 Va. 779; *Tatum* v. *Ballard*, 95 Va. 370; and *Ellett* v. *McGhee*, Id. 377.

In such case the grantee becomes not only personally bound and primarily liable for the debts, but in the event of their not being paid, a court of equity will treat the transaction in the nature of a trust, and subject the property in the hands of the grantee or his representatives to their payment. It was so held in the case of *Vanmeters' Ex'ors* v. *Vanmeters*, 3 Gratt. 148, and the same principle would apply where the grantee had made a voluntary conveyance or settlement of the property. The *assumpsit* by the mother of Morgan Moore of his debts constituting a part of the consideration for the conveyance to her of his land, it would be against equity and good conscience to permit her to make a voluntary settlement of the property so as to protect it from liability for the debts in the hands of her beneficiaries. One must be just before he can be generous. He cannot make a valid gift of his property and leave his obligations unsatisfied or unprovided for. It was proper to decree in this case a sale of the land to pay the debts.

Another assignment of error was the refusal of the court to accept the upset bids put in on certain parcels of the land, and its confirmation of the sale that had been made thereof.

Whether a court should confirm a report of sale depends in a great measure upon the circumstances of the particular case. In acting upon the report, it must exercise not an arbitrary, but a sound legal discretion in view of all the circumstances. It must be exercised in the interest of fairness, prudence and with a just regard to the rights of all concerned. This is the result of many cases on the subject. *Hudgins* v. *Lanier, Bro. & Co.*, 23 Gratt. 494; *Brock* v. *Rice*, 27 Gratt. 812; *Roudabush* v. *Miller*, 32 Gratt. 454; *Berlin* v. *Melhorn*, 75 Va. 639; and *Hansucker* v. *Walker*, 76 Va. 753.

In *Todd* v. *Gallego Mills Mfg. Co.*, 84 Va. 577, it is said: "All the cases agree that the court must sell at the best price obtainable; and when a sabstantial upset bid, well secured and safe, for ten per cent. advance, is put in before confirmation it is as much a valid bid as if made at the auction. This is the settled law of this court, and will doubtless so remain until the legislature shall [otherwise] provide by law as has been done by the English Parliament." This same language was quoted with approval in *Ewald* v. *Crockett*, 85 Va. 299.

The above statement of law was construed by the counsel of the appellants to be a departure from the previous cases and the former practice in this State and to mean that "a substantial upset bid, well secured and safe, for ten per cent. advance, put in before confirmation," was *always* to be accepted without regard to the circumstances of the case, and that the court had no discretion in the matter. Such construction is a misapprehension of the import of that decision. The court in that case found no equitable circumstances, which, in the exercise of a sound legal discretion, called for a rejection of the upset bid. It was in amount a large advance on the price obtained at the sale, and in that view substantial. It was well secured and safe. The creditors whom it benefited desired its acceptance, and the purchaser, as the court took pains to show at length, had no just ground of complaint. We understand the decision in that case to mean simply that a substantial and well secured upset bid should be accepted, unless there are circumstances going to show that injustice would be done to the purchaser or other person. That such was the purport of that decision and the understanding of the judge who delivered the opinion of the court in that case and also in *Ewald* v. *Crockett, supra,* is clearly manifested in the subsequent case of *Carr* v. *Carr*, 88 Va. 735,

where he enunciates the long and well established rule in Virginia that "the court, in acting upon the matter, was called upon to act in the exercise of a sound legal discretion in view of all the circumstances. It is to be exercised in the interest of fairness, prudence, and with a just regard to the rights of all concerned." And he refers to the cases decided long before *Todd* v. *Gallego Mills Mfg. Co.* to sustain his declaration of the practice and the law on the subject in this State.

Considering the circumstances of the case at bar and applying the rule prevailing in this State, our conclusion is that the Circuit Court did not err in rejecting the upset bids and confirming the report of sale of the parcels of land in question.

The sale took place under favorable circumstances, was fairly made, and there is not a suggestion of misconduct or impropriety on the part of any one.

There is no evidence or complaint even that the land did not sell for a fair price and bring its market value. The commissioners state in their report that it brought a good price, and recommend the confirmation of the sale.

The main upset bid was put in by one who had an agent at the sale, who bid for him. It has been generally understood by the profession and enforced by the court that one who was a bidder at the sale, by himself or by an agent, which is the same thing, or was present and had the opportunity to bid, would not, as a general rule, be permitted to put in an upset bid. He must bid at the sale in open competition with all others what he is willing to give for the property. A different rule would have a pernicious effect upon judicial sales of property.

The contention over the rejection of the upset bids is not made by the parties who put in the same, but by the owners of the land. As respects the rights of the latter, it appears that every fair means was resorted to that was likely to realize the best possible price at the sale. It was advertised in two of the county newspapers for upward of sixty days, and the several tracts divided into two or more convenient parcels for the purposes of the sale. The parcels were first offered for sale and then the tract as a whole, with the understanding that the largest amount realized would be reported to the court as the sale. That by parcels realized the largest amount. The entire farm, embracing all the tracts and parcels, with the exception of the mansion house and fifty-four acres that had been cried out to the wife of Morgan M. Moore, was then offered as a whole, without, however, any advance

bid being made on the sale by parcels. The mansion house and fifty-four acres was excepted from the offer of the whole farm at the request of Morgan Moore. As stated by the judge of the Circuit Court, "the sale of the land seems to have been conducted by the commissioners in strict accordance with the wishes of the Moores, the owners of the land. The terms of sale were modified to advance their interest. The land was offered in such parcels as they indicated, and offered as long and as often as they requested. They did not then, nor do they now, make any complaint that the sale was not an open and fair bidding, and the prices obtained were not all that could have been expected and desired." The circumstances of the sale furnish them no ground for any complaint.

The case of the purchaser would be very different if the upset bids were accepted. They were made on only a part of his purchases, and his other purchases would stand and be confirmed. The farm is composed of lowlands and uplands. The bottom lands are fertile and productive; the uplands are poor and in part wild and uncultivated. In dividing the farm for the purposes of sale, it was wisely so laid off into parcels that any one buying a parcel of the productive bottom land could also buy a contiguous or conveniently located parcel of upland, and the two be utilized together. The owner of the one would find it convenient and desirable to own the other, but he would not desire to own any part of the upland unless he could also own some convenient part of the bottom land. The purchaser, J. I. Triplett, having at the sale first bought a parcel of the lowland, was thereby induced and willing to buy upland that could be advantageously used along with it. The latter, without the bottom land, he did not want, and would not have given as much for it as he bid, if, indeed, he had bid for it at all. The upset bids were made on only a part of his purchases, and one of them so circumscribed that, if accepted, he could not bid on the parcels as at the last sale. It was an offer of an advance of seven and a fraction per cent. on a parcel of the bottom land bought by him and upon another parcel of like land bought by another person, and made a condition that *both parcels be again offered as one tract.* The other upset bid is a small advance on one of the parcels of upland bought by Triplett. If the upset bids were accepted, the effect would be to compel him to take in any event all the parcels of upland except one, which he would not have purchased at all if he had not first bought the parcel of bottom land, and force him to buy not only it on the resale, but also the other parcel of bot-

tom land coupled with it as a condition of the upset bid, and incur the risk of having to pay an exorbitant price for them both. This would be eminently unfair and unjust, and a court of equity will never put a judicial purchaser in such a situation. The court, in the interest of fairness and justice, in view of all the circumstances, rightly rejected the upset bids, and confirmed the sales of the land as made by the trustee and commissioners under its decree.

Judicial sales are constantly taking place, and it must continue to be so as long as there are debts to be collected and liens to be enforced. Great care should be observed that the practice of the court in acting upon a report of sale should not be such as to deter or discourage bidders, but such as to induce possible purchasers to attend such sales, to encourage fair, open and competitive bidding in order that the highest possible price be obtained, and to inspire confidence in the stability of judicial sales. This is due not merely to the purchaser, but also to creditors, debtors, and the owners of property which has to be sold by the court.

There were a number of other errors assigned, which related to minor matters, such as the appointment of the receiver in the case and the settlement of his accounts. Due notice was given for his appointment and no objection made, and, as respects his accounts, it is sufficient to say, without particularizing, that no error appears in the action of the court.

The decrees appealed from must be affirmed. *Affirmed.*

UPSET BIDS.

We are glad to observe the effort of the court to give greater stability to judicial sales, and our only regret is that it could not see its way clear to go much further than it has gone. Whatever way be the proper construction of the language used in *Todd* v. *Gallego Mills Mfg. Co.*, 84 Va. 586, the fact remains that all over this State the circuit courts have held that "when a substantial upset bid, well secured and safe, for ten per cent. advance, is put in before confirmatiou, it is as much a valid bid as if made at the auction," and they were well warranted in so holding, for that is the very language of the court in that case. It is true the court did state the general principles attributed to it in the principal case, but it is also true that it set aside the sale on an upset bid of ten per cent. put in by one who was present at least a part of the time during the public sale. Probably the inferior courts have placed a wrong construction on that case, but the result has been disastrous to judicial sales, and if the court feels bound, under the rule *stare decisis*, to adhere to the English rule, in a modified form, of "opening the biddings," no other course seems open for the protection of purchasers at such sales but to appeal to the legislature to adopt a statute similar to the English statute on

the subject, declaring the highest bidder the purchaser, except in cases of fraud, improper management, etc.

Probably the fullest discussion we have in Virginia of the rights of a purchaser at a judicial sale *before confirmation* is to be found in *Roudabush* v. *Miller*, 32 Gratt. 454. In that case most of the prior cases are cited. Judge Anderson, in the course of his opinion, says: "It has never been decided by this court how far the English practice has been adopted in this Commonwealth. . . . It has never been held that for mere inadequacy of price the court should set aside the sale. That question has not been decided by a full court." Again, he says: "In a proper case, where it would be just to all the parties concerned, this court may be understood as having sanctioned a practice in the circuit courts, in the exercise of a sound discretion, of setting aside a sale made by commissioners under a decree, and reopening the bidding upon the offer of an advance bid of a sufficient amount deposited or well secured; and to that extent the former English practice has been allowed in this State. But it has never been held that it is imperative upon the courts to set aside the sale and reopen the bids." The principal case, however, and others therein cited, as we understand them, recognize the doctrine that it is the duty of the courts to refuse confirmation of the sale, and to reopen the bidding for mere *inadequacy of price*, unless under the peculiar circumstances of that case, it would work injustice to some one. It is true that it is said that the advance must be *substantial*, not merely ten per cent., and that the rights of all parties must be considered, and that generally one present at the sale should not be allowed to put in an upset bid, but the objection we make is the recognition of the doctrine that *mere inadequacy of price* is of itself sufficient to warrant the court to reopen the bidding. We admit that such was the former English practice, but it became so detrimental that it was changed by Act of Parliament. 2 Dan. Chy. Pr. (4 Am. ed. by Perkins), p. 1284, note 7; *Graffam* v. *Burgess*, 117 U. S. 190. But there was more reason in the English practice than in ours. As we understand the English practice the purchaser of *real estate* at a judicial sale paid no money and gave no bonds until the sale was actually confirmed. And even after confirmation if he was found to be insolvent and unable to "complete his contract," he might, on motion, be discharged from his bidding, and the estate resold. *He was a mere bidder*. 2 Dan. Chy. Pr. 1272, 1275, 1281. But the practice is far different with us. Here the purchaser is required to make his cash payment, and execute his bonds with sufficient security on the day of sale, or certainly before confirmation. He may have been put to the most serious inconvenience to raise his cash payment, and whether his bid is ever accepted or not, he has placed himself under obligation to others by asking them to become sureties on his bonds. It would seem that he had thereby acquired some rights which the courts ought to respect. The bidder under the English practice was a *mere bidder*. He parted with no money and gave no bonds. He simply agreed to take the property at his bid. The bidder under the Virginia practice has to complete the contract of purchase, leaving nothing undone except to pay his bonds as they mature.

It is believed that the decided weight of authority in the United States is against the Virginia doctrine. In 8 Am. & Eng. Encl. Pl. & Pr. 65, it is stated that "the English practice of opening the biddings upon a substantial offer of an advanced price does not generally prevail in this country." Virginia, North Carolina and Mississippi are the only States put down as distinctly recognizing the former

English doctrine, while many are put down on the other side. The Supreme Court of the United States holds the doctrine of a majority of the States "that a sale will not be set aside for inadequacy of price, unless the inadequacy be so great as to shock the conscience, or unless there be additional circumstances against its fairness; being very much the rule that always prevailed in England as to setting aside sales after the master's report had been confirmed." *Graffam* v. *Burgess*, 117 U. S. at pp. 191–2. The case just cited is not directly in point, as it arose on the redemption from a mortgage, and the court speaks of setting aside a sale, rather than refusing confirmation, but the last sentence quoted seems to indicate that the court meant to apply that rule on an application to confirm. Certainly the court so regarded it, for it is cited to that point in *Pewabic Mining Company* v. *Mason*, 147 U. S. at p. 367. In the latter case the court says: "The purpose of the law is that the sale shall be final; and to insure reliance upon such sales, and induce biddings, it is essential that no sale be set aside for trifling reasons, or on account of matters which ought to have been attended to by the complaining party before," p. 356. Again, on p. 357: "It cannot be tolerated that it be in the contemplation of either to wait until after the property has been struck off to the other, and then open the bidding and defer the sale by an increased offer." Again, on p, 367: "Indeed, even before confirmation, the sale would not be set aside for mere inadequacy, unless so great as to shock the conscience." There may be some doubt as to whether the last mentioned case is directly in point, but the above quotations can leave no doubt on the mind of any one what the position of the court is on this question.

This is the position we should like to see taken in Virginia. It is no rule of property, but one of practice. It will disturb no vested rights, but go far to give stability to judicial sales, and we trust that the day is not far distant when the court can see its way to take this view of the matter.

Again, the English doctrine recognized the right of *any one* to open the biddings. This was entirely consistent with the view that the purchaser was a *mere bidder*. Such being his position, every one else had the same right to bid that he had until confirmation. We doubt if the practice has been uniform in this State on that subject. The better practice would seem to restrict the right to object to confirmation *for any cause*, including, of course, inadequacy of price, to some party or *quasi party* to the suit, or some one interested in the subject. If these are satisfied with the sale it is difficult to perceive what right a *stranger* has to inject himself into the controversy and say that the property has not sold for an adequate price. He would not be heard to object to any other step taken in the cause, or even to the sale for any other reason than mere inadequacy, and if the purchaser *has any rights in the cause*, a *stranger* who has none should not be allowed to come in and assail those rights. In practice, however, little difficulty will be found in procuring some *party* to except to the sale for inadequacy. This only emphasizes the view that mere inadequacy should not be sufficient ground for refusing confirmation.

This leads us to inquire a little further into the details of offering an upset bid. There seems to be a great lack of uniformity in the practice as to the form of upset bids, and the method in which they are offered to the court. Without meaning to criticise existing methods we suggest the following as a proper course to pursue: *Some party to the suit should* except to the report of sale on the ground

of inadequacy of price, and as evidence of the inadequacy file with his exception, as a part thereof, the upset bid. The upset bid should consist of a written offer signed by the party and accompanied by the money or its equivalent, for the cash payment, and bonds with good security for the deferred payments *payable to the commissioner who made the sale.* The bonds should be complete and ready for delivery, and should be dated the day of the sale sought to be set aside, and payable according to the terms of sale. In this way neither time nor interest will be lost. If the bid is rejected, the cash and bonds should be returned at once. If accepted a resale should be ordered *on the same terms as before,* unless an upset bid on different terms has been accepted, in which case it should be on the terms mentioned in the bid, and the decree should direct the bidding to commence with the amount of the upset bid. The decree might *possibly* also provide that if no higher bid be made, the sale stand confirmed as of the date of the decree to the party putting in the bid, and on the terms thereof. Of course, if a higher bid be offered, provision should be made for returning to the party his cash payment and bonds.

A petition, or a mere certificate of a party that he will give so much as an upset bid, and a separate certificate of another person that he will become surety on the bonds, may present serious trouble, in case of default, in proceeding *at law* to make any deficiency that may subsequently be shown to exist. Again, many of these petitions and certificates fail to waive the homestead exemption, as in one of the upset bids filed in the principal case. This would not be likely to occur if complete bonds were required, nor would there be any loss of time or interest. If, however, certificates were used, as in the principal case, and the party offering the bid failed to comply and there was a consequent loss, the principal and surety might be proceeded against by rule in the suit in which the sale was ordered and a decree be rendered against both for the amount of the deficiency and the costs. Formerly no decree could be taken in the chancery suit against the surety of a purchaser at a judicial sale. *Anthony* v. *Kasey,* 83 Va. 338. But this is now provided for and regulated by statute. Acts 1887–8, ch. 211, p. 261.

M. P. BURKS.